No. 88-1010

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

LANDAHL, BROWN & WEED ASSOCIATES, INC.
Petitioner

v.

LONGARDNER & ASSOCIATES, INC.
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY STATEMENT OF FACTS

The opposition statement of facts at page 2-4 points out that the Bankruptcy Court ruled that Landahl had been given notice of the March 7, 1985 hearing. This is misleading in that the Court did not rule that Landahl received actual notice but that the Court file contained a certification of the Clerk that notice had been sent to all parties. Landahl never had an opportunity to contest this finding as no mention or suggestion of the Clerk's certification was raised by the parties or the Court at the hearing to set aside the Court's order. The existence of the certificate first came to light in the Bankruptcy Court's order and Landahl never had an opportunity to question its accuracy, question the person who prepared it or otherwise raise doubts or questions about it. The certification was a general certification as to all creditors. From this certification it was presumed that Landahl was delivered notice of the hearing of March 7, 1985.

However as to the order entered on March 7, 1985, it was known to everyone that Landahl had strong and serious objections to the reorganization plan and had previously appeared in Court prepared to proceed with evidence to contest the plan. But, neither the Court, opposing counsel nor the Clerk intended to send Landahl notice of the order that had been entered. Instead, Longardner's counsel presented a

prepared order in open court on March 7, 1985 and the Court signed it and that was the end of the matter as far as everyone was concerned. The statements in the opposition brief at page 2 as to the findings of the Bankruptcy Court in the March 7, 1985 order are misleading in this respect, as the order was a form type order preprepared by Longardner tracing the necessary language under the Bankruptcy Act for the approval of a plan of reorganization. Those statements of findings were not findings the Court made based upon any evidence presented.

REPLY STATEMENT OF PROCEEDINGS BELOW

The opposition brief incorrectly states at page 4 that the record from the Bankruptcy Court was devoid of any evidence on the issue of fraud. It is to be remembered that Landahl never was given the opportunity to present evidence to object to the plan in the Bankruptcy Court, as the hearing was held in its absence. However, substantial and compelling evidence of fraud clear from the face of the Court file was presented to the Bankruptcy Court and thereafter at each level of appeal. See the Reply Appendix hereto R-1, R-4, R-10.

Where Landahl's problems concerning fraud arose was in the hearing to set aside the March 7, 1985 order. The Judge was assailing Landahl's counsel for contending that the Clerk of Court had not sent notice to him and challenged Landahl's counsel to show fraud. Landahl's counsel stated that he did not think there was any fraud, referring to the Clerk of Court. This comment by Landahl's counsel, taken out of context, has been utilized incorrectly to state that Landahl has not shown fraud and has not alleged fraud. See opposition brief pages 5 and 12. In fact, the pleadings in the Bankruptcy Court are very specific in pointing out the acts of fraud and false filings by Longardner. See Reply Appendix R-1, R-4 and R-10.

REPLY TO REASONS FOR DENYING THE WRIT

The Seventh Circuit held that since the Bankruptcy Court had ruled that the notice of the March 7, 1985 hearing had been mailed to Landahl, and therefore, it was presumed to have been received, that the due process requirements had been met in regard to not only the notice of the March 7, 1985 hearing but the order that was entered on March 7, 1985 as well. The opposition brief at page 8 suggests that Landahl could have telephoned the Clerk, or attended the hearing. All this assumes Landahl had "knowledge" of the

hearing and order, which it did not have. The time for appeal is 10 days, and it is absolutely impossible to telephone the Clerk within every ten day period over the pending years of a case to determine its status. Also, Clerk's now charge a search fee. The suggestion that an attorney had the duty to stay abreast of the status of the case by checking the Court file is unrealistic. An attorney necessarily is required to rely on timely and correct notices from the Clerk and opposing counsel, and when they fail in their duty, the results produced in this case occur.

Contrary to the contentions of Longardner, due process does require that Landahl receive notice of both the hearing and of the entry of the order from that hearing, especially when it had no "knowledge" of the hearing, as in the present case.

At page 9 of the opposition brief, it is stated that Landahl did not raise constitutional issues in its brief. This is incorrect. Constitutional and due process issues were raised at pages 26 and 36 of the petition, with citation of cases. Even the cases cited in the opposition brief point out the constitutional and due process issues. See, for example, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983). The constitutional and due process issues were first raised in the Bankruptcy Court. Reply Appendix 1.

The opposition brief at page 11 is misleading in stating that "Bankruptcy Judge Sufana allowed

Landahl to file a 'Motion'" and is suggesting incorrectly that Landahl's "motion" was not in strict compliance with the Bankruptcy Rules. The Bankruptcy Rules provide for Landahl to proceed by "motion" rather than by "complaint", as explained in the petition at pages 32-33. Landahl was in the Bankruptcy Court under Bankruptcy Rule 3020(b)(1) and the proper Rules for Landahl to have proceeded under was Bankruptcy Rules 3020(b)(1) and 9014, and these are the Rules under which it proceeded. Pursuant to Bankruptcy Rule 9024, the relief allowed by Rule 60 F.R. Civ.P applied to Landahl's "motion". The exclusion provided for in Bankruptcy Rule 9024(3) does not apply to Landahl's "motion" which was properly filed as a "motion", as the exclusion applies only to a "complaint", and this distinction was intended by the drafters of the Rules.

At page 7 of the opposition brief, it is stated that there is no conflict in the Circuits and no important question of federal law. The petition very clearly cites the cases in conflict, but the opposition brief has failed to address the cases cited.

The issues presented in the petition are important, as the number of conflicting cases reflect. The Circuits are having difficulty with the issues and this Court should resolve them. It is highly significant that Court rules have been adopted that deny parties their right of appeal even though no notice of the entry of an order has been sent, as is the case with Bankruptcy Rule 9022(a) (and Rule 77(d) F.R.Civ.P), which circumvented

this Court's ruling in Hill v. Hawes, 320 U.S. 520 (1944). It is also highly significant that an order can be entered divesting a party of his rights, and even thought no notice was intended to be provided to the party of the entry of the order, the party is divested of his rights unless he can show fraud (without the opportunity to engage in discovery or otherwise undertake to show fraud), as is the case with 11 U.S.C. §1144.

The petition for writ of certiorari should be granted.

REPLY APPENDIX

MEMORANDUM IN SUPPORT OF MOTION TO SET ASIDE ORDER

COMES NOW creditor, Landahl, Brown & Weed Associates, Inc., (Landahl), and submits the following legal memorandum in support of its motion to set aside the March 7, 1985 order confirming the amended plan and disclosure statement of the debtor.

* * *

5. The Supreme Court in numerous cases has held that the due process clause of the Constitution requires notice before any party may be deprived of his property. Armstrong v. Manzo, 380 US 545 (1965); Gross v. Lopez, 419 US 565 Interstate Commerce Comm. v. Louisville & N.R. Co., 227 US 88 (1941); Fuentes v. Shevin, 407 US 67 (1972).

6. Pursuant to the provisions of 11 USC §1144, the Court may revoke an order confirming a plan

if the order was procured by fraud. Landahl does not suggest that the March 7, 1985 order was procured by fraud, but by some mistake notice was not sent to Landahl of the hearing. The record is replete in this case with evidence that Landahl objected to the debtor's reorganization plan and with the debtor's failure to disclose its finances, and "where the money went?" See Exhibit A and B, hereto. Landahl's objections, and it is submitted clear evidence of false or fraudulent filings and statements to this Court by the debtor, were not considered by the Court in its March 7, 1985 ruling. The provisions of 11 USC §1144 assume the statutory and constitutional due process requirements were met, which is not the situation in the case of Landahl.

7. Landahl did not receive the required notice or the opportunity to be heard, and its objections were not considered by the Court, and it is, therefore, respectfully submitted that this Court should set aside its March 7, 1985 order confirming the debtor's plan.

8. Landahl submits to the Court that no prejudice would attach to any party by the Court setting aside its order of March 7, 1985. A review of the initial

petition, with the completed forms for assets and liabilities, together with subsequent filings (including the second amended disclosure statement), show that the debtor should have made very minimal distribution under the plan, and that no party would be prejudiced by setting aside the order. In view of the present status, Landahl would not request that any payments already made to noninsiders be returned.

9. Additionally, Landahl would encourage the Court to review the allegations in Exhibits A and B, hereto, in regard to whether the debtor had engaged in a fraud upon this Court in regard to representations and statements of assets and liabilities and the whereabouts of monies collected following the filing of the bankruptcy petition. These Exhibits also show improper insider dealing following the filing of the petition.

OBJECTION TO PLAN OF REORGANIZATION

COMES NOW Landahl, Brown & Weed Associates, Inc., and through counsel, and files this objection to the plan of reorganization proposed by the debtor, and states:

* * *

3. The amended plan of reorganization proposed by the debtor and the second amended disclosure statement submitted by the debtor reflect that the plan of reorganization proposed by the debtor should be rejected by the Court. The information provided in the disclosure statement when compared with the financial records of the debtor shows gross and serious inconsistencies, and raises insurmountable questions concerning the accuracy of the disclosure statements and the plans submitted to the court by the debtor. The proposed plan is not fair and equitable. Additionally, the proposed plan discriminates against Landahl; Brown & Weed Associates, Inc.

4. The liquidation analysis and the disclosure statement present that the accounts receivable of the debtor total only $24,770.00. However, the disclosure statement concedes there are accounts receivable on the debtor's books in excess of $967,000.00 (at page 3). The disclosure statement states that all of these accounts receivable are uncollectible. More correctly, the debtor has collected and settled one account receivable with Geo-Power, Inc. in the amount of $265,757.55. See Interim Financial Report No. 11 filed by the debtor. This account receivable of $265,000.00 was collected without any benefit being shown in the liquidation analysis or without any benefit to prefiling creditors. One major recipient of the benefits from the collection of this $265,000.00 was Robert L. Longardner personally. See Exhibit A attached hereto. It is submitted that the liquidation plan should reflect not only the $265,000.00 account receivable collected from Geo-Power, Inc. but also the total sum of accounts receivable at the time of filing of the debtor's petition and monies subsequently collected under those accounts. If these accounts are included in the liquidation analysis, the result would be

that Landahl, Brown & WeedAssociates, Inc. is receiving less monies ($5,000.00) under the plan of reorganization than it would in liquidation of the debtor. Under a correctly and properly prepared liquidation analysis, Landahl, Brown & Weed Associates, Inc., as well as all other creditors, would be paid in full. As the disclosure statement states the debtor has a cash flow problem (page 2). If the creditor is to receive less money under a plan of reorganization than he would in liquidation, the plan may not be confirmed by the court. 11 USC §1129.

5. The Third Amended Summary of Debts and Property filed with the Court in July 1983 by the debtor shows $325,782.80 in debts with $1,199,061.21 in assets. Included in those assets are physical and personal property listed with a value of $196,778.00. The liquidation analysis only designates a total of $99,000.00 as drafting supplies, computer, office equipment and a jeep. An earlier liquidation analysis only designated a total of $44,000.00 in personal property. None of the $196,778.00 in the Third Amended Summary of Debts and Property is included in

either liquidation analyses. A debtor should not be permitted to make factual statements in schedules which are filed with its petition and at a later date in the interest of confirmation of a plan of reorganization so thoroughly and totally disregard, and easily refute, those factual statements made in schedules filed with the petition. These acts by the debtor in this case call for the close and careful scrutiny of the debtor. As previously pointed out, a comparison of the debts in the latest schedules with the plan of reorganization show a reduction in one month of assets from $1,199,061.21 to $84,000.00. Compare the Third Amended Summary of Debts and Property filed with Court on July 26, 1983 with the liquidation analysis dated August 26, 1983. The latest liquidation analysis date May 31, 1984 reduced the total assets to slightly less then $119,426.00. The Court should not accept such conduct from a debtor proposing a plan of reorganization, and especially in a case where the debtor proposes to pay under the plan of reorganization only $5,000.00 to a creditor with a judgment in excess of $266,000.00.

6. The list of accounts payable filed with the

petition shows Robert Longardner to be a creditor in the amount of $86,189.90. In addition, Robert Longardner has a wage claim under Schedule A(a) in the amount of $38,958.22. In reading the plan of reorganization it is impossible to understand the payments that are to be made to Mr. Longardner. Complicating the matter is that the claims of Mr. Longardner and that of other unsecured claims are to be paid on an indefinite basis. Some of the claims have been previously paid but no no credit has been applied in the liquidation analysis. The extent of this is unknown at this time. Mr. Longardner has already received a substantial money and property benefit from the debtor in the collection of $265,000.00 settlement with Geo-Power, Inc. See Exhibit A. The plan is not clear in regard to payments to Class 7 and Class 8 (Longardner). The plan discriminates unfairly against Landahl, Brown & Weed Associates, Inc. and is not a fair and equitable treatment of the claim of Landahl, Brown & Weed Associates, Inc. with that of Mr. Longardner, especially in view of his insider position and insider dealing with the debtor. See Exhibit A. Mr. Longardner personally will receive a

windfall as an officer and stockholder for any accounts collected and assets not paid under the plan by virtue of the incorrect liquidation analysis. In the debtor's settlement and collection of the $265,000.00 account receivable of Geo-Power, Inc., Mr. Longardner received 2,732 shares of the debtor's stock, $10,000.00 in cash and payment of his debt to Bloomfield State Bank. Exhibit A.

7. Additionally, the schedule filed by the debtor and the plan of reorganization with the accompanying disclosure statement, fail to mention 247 computer programs owned by the debtor. See Exhibit B. In the face of this, the Court should not approve the plan.

8. Additionally, the plan provides that upon the payment of $5,000.00 to Landahl, Brown & Weed Associates, Inc., that the claim against Mr. Longardner will be released along with that of the debtor. The Court has no jurisdiction on this matter, and such a provision constitutes a discriminatory and an unequitable plan.

OBJECTIONS TO AMENDED DISCLOSURE STATEMENT

COMES NOW Landahl, Brown & Weed Associates, Inc., by and through counsel, and files this objection to the amended disclosure statement filed by the debtor, Longardner & Associates, Inc., and states:

* * *

2. The amended disclosure statement at page 3 states that the debtor's accounts receivables consist of only a face value of $176,000.00, and the liquidation analysis attached to the amended disclosure statement lists the accounts receivable as "zero" value. However, Schedule B-2 and the Summary of Debts and Property filed as late as July 1983 by the debtor show the accounts receivable to be of the value of $967,362.61. Substantial explanation is needed in regard to the accounts receivables. In view of the facts, and especially since the debtor states these receivables originally listed at $967,392.61 now have no liquidation value. It is submitted that the disclosure statement should list

each receivable by name and address, and by the amount and date of the debt, with a very specific explanation as to the reason why the receivable has no value.

3. The amended disclosure statement at page 3 designates as Class 3 the priority wage claims of approximately $8,000.00. The liquidation analysis also lists the priority wage claims as being $8,000.00 in amount. However, Schedule A - Statement of all Liabilities of Debtor (Schedule of Assets and Liabilities) lists the priority wage claims as being in the amount of $48,834.27. The list of wage earners owed this $48,834.27 include the claim of the principal of the debtor, Robert Longardner, for the sum of $38,958.22. It is submitted that the disclosure statement should explain this inconsistency, and whether Robert Longardner had waived his wage claim.

4. The Third Amended Summary of Debts and Property filed with the Court in July 1983 shows $325, 782.80 in debts with $1,199,061.21 is assets. Included in those assets is physical personal property listed with a value of $196, 778.00. The liquidation analysis only

designates a total of $44,000 as computer, office equipment and a jeep. None of this property is listed in the Third Amended Summary of Debts and Property, and none of the $196,778.00 in the Third Amended Summary of Debts and Property is included in the liquidation analysis. Further, the Third Amended Summary of Debts and Property shows the sum of $873,278.41 ($1,199,061.21 - $325,782.80 = $873,278.41) as being available in excess of debts for distribution. It is submitted that the disclosure statement should explain in detail what happened to these assets of the debtor, and how assets of $1, 199,061.21 are reduced to $84,000 in only one month. The Third Amended Summary of Debts and Property was filed with the Court on July 26, 1983 and the liquidation analysis is dated August 26, 1983.

5. The amended disclosure statement states that Columbia Energy Storage, Inc. a Nevada corporation, is to provide an input of $70,000 as new capital for the debtor. It is submitted that the disclosure statement should explain the relationship of Columbia Energy Storage, Inc. to the debtor both before and after

such input of new capital, and the motivation for such arrangement by Columbia Energy Storage Inc., especially in view of the property and asset problems mentioned above. Each creditor should be placed in a position of evaluating how his treatment under a proposed plan compares with others, including new investors or creditors of the debtor.

6. The amended disclosure statement states that Class 8, which are the claims of Robert Longardner and William J. Longardner, are to be reduced to the same percentage of payment as the payments to Class 7, which are the claims of the general unsecured creditors, except that of Landahl, Brown & Weed Associates, Inc. (Class 6). The statement relates that it is anticipated that approximately 50% of the Class 8 and Class 7 claims are to be paid, but only .02% of the Class 6, Landahl, Brown & Weed Associates, Inc., claim is to be paid, i.e. $5,000. If there is a basis for such distinction between the classes, it should be related in the statement, and the reason for the discrimination against Landahl, Brown & Weed Associates, Inc. in favor of the principals, Robert Longarder and William

Longardner, should be disclosed, in order that an informed decision may be made on the acceptance and approval of the proposed reorganization plan. In view of the obvious substantial claims of the debtor's principals, a disclosure should be made as to exactly what amount these insiders are to receive, in dollar figures. From reading the statement this is not clear. The debtor's schedule show Robert Longardner to be an unsecured creditor, inter alia in the amount of $86,189.90 and to also have a wage claim for $38,958.22.

* * *